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ABSTRACT

This monograph traces the themes in various court decisions that reflect a growing respect for the broadcast industry as a mature communication medium which, despite federal regulation, deserves a fuller measure of the First Amendment protection enjoyed by other media. The review begins with the first government involvement in broadcast content in 1929 when the Federal Radio Commission--predecessor of the Federal Communications Commission (FCC)--moved beyond technical supervision to setting programing standards for licensees. The review continues through the 1960s, when broadcast regulation gained broader scope under the Supreme Court, up to the present, when the FCC and the Supreme Court seem to be lessening their involvement in any form of broadcast content. The affirmative interpretation of the First Amendment, "the fairness doctrine," the landmark "Red Lion Broadcasting Co. v. FCC" decision, the "CBS v. DNC (Democratic National Committee)" decision that replaced "Red Lion" as the leading precedent in broadcast regulation, and the "family hour" viewing decisions are among the issues discussed in depth. (AEA)

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JEROME S. SILBER

# *Broadcast Regulation and the First Amendment*

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JEROME S. SILBER is a law clerk in the New York office of the communications law firm of Fly, Shuebruk, Blume, Gaguine, Boros and Schulkind. This monograph began as an M.A. thesis at Pennsylvania State University under the supervision of Professor Donald L. Smith. Mr. Silber is also a law student at Pace University.

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IN HIS decision declaring TV's "Family Viewing Hour" unconstitutional, Federal Judge Warren J. Ferguson wrote that "this is not the family hour case. The desirability or undesirability of the family viewing policy is not the issue. Rather, the question is who shall have the right to decide what shall and shall not be broadcast."[1] Similarly, this is not a study of the desirability or undesirability of broadcast regulation. It is, rather, a study of themes in various court decisions that reflect a growing respect for the broadcast industry as a mature medium of communication which, despite federal regulation, deserves a fuller measure of the First Amendment protection enjoyed by other media.

Technological advances (especially cable TV and satellites) have begun to destroy old rationales for broadcast regulation, leaving regulatory agencies groping for a tradition on which to base their authority. The Georgetown Law Journal Association saw this developing seven years ago when it wrote that legal precedents in broadcast regulation were becoming "inadequate to meet present and future challenges."[2] Jerome Barron, a leading communications lawyer and professor at the George Washington Law School, gives the traditional rationales as scarcity of frequencies, public ownership of broadcast frequencies and the legitimate claims of those unable to gain access to those frequencies for expression of their views.[3]

The findings of social psychologists are beginning to provide new rationales for regulation. "It may be, for example, that a record could be compiled that would demonstrate that particular types of programming are so demonstrably injurious to the public health that their entitlement to First Amendment protection in the broadcasting medium could be properly questioned."[4] And the Georgetown group has warned: "Before a new regulatory scheme can be shaped by the courts, a new rationale for regulation must emerge,"[5] a rationale recognizing both the media's potential power and the dangers inherent in governmental regulation of that power.

Under the current system of broadcast regulation, the view orginally espoused by the Supreme Court in *Red Lion v. FCC*,[6] remains the best explanation of why stations must be licensed to operate in the "public interest, convenience and necessity."[7] The broadcaster remains a "public trustee," licensed to operate independently, keeping in mind the paramount rights of the viewers and listeners.

That broadcasters have protection under the First Amendment has long been established. The premise for this analysis is that broadcasters are being given the right to operate under decreasing amounts of governmental or quasi-governmental supervision. That this decreasing supervision sometimes takes a step backwards is what keeps broadcasters (and their attorneys) on their toes.

### *The Growing First Amendment Rights of Broadcasters*

Early broadcasters sought federal relief from technological interference after attempts at self-regulation had failed. As secretary of commerce, Herbert Hoover once said of the broadcasting industry, "I think this is probably the only industry in the United States that is unanimously in favor of having itself regulated."[8] But rather than facing a "traffic cop of the air," many broadcasters feel they now must deal with an armed militia.

Originally, the Federal Radio Commission (FRC), which preceded the Federal Communications Commission (FCC), was thought to have only technical supervision over frequency allocation. In 1929, the FRC set forth standards for what it felt was desirable programming by licensees. Governmental involvement in broadcast content had begun. Originally narrowly defined, broadcast regulation gained broader scope during the 1960s under the Warren Court. The FCC and U.S. Supreme Court are now once again showing signs of narrowing that scope to have less involvement in any form of broadcast content.

Broadcast regulation relies on both traditional and innovative interpretations of the First Amendment. Traditionally, the Blackstonian definition of censorship focused on prior restraint. Anything short of this blatant act of control was considered acceptable, given proper reason to act. Thus, the negative phrasing of the

Amendment, forbidding Congress from passing any law that would abridge freedom of the press, has succeeded in keeping government out of cenorship *per se*. On an administrative level, Section 326 of the Communications Act of 1934 proscribes the FCC from acting as a censor[9] in the traditional sense. The FCC can review a station's past programming to see if it has operated in the public interest. When in 1943, the National Broadcasting Company argued that the FCC was limited to controlling frequency allocation and could not regulate the content and source of programming lest its First Amendment rights be violated, the Supreme Court rejected both arguments, ruling that the FCC is empowered to determine traffic on the airwaves and must be guided in that task by the public interest. "Denial of a station license on that ground, if valid under the Act, is not a denial of free speech."[10]

### *The Affirmative Interpretation of the First Amendment*

A still broader interpretation of the First Amendment rests on its intent to serve the public, rather than on its protection of the broadcaster or publisher. Many writers and jurists have addressed this interpretation in terms of a "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open."[11] "In seeking to provide the broadcasting medium with the diversity demanded by the First Amendment, . . . the Commission must avoid the perils of both inaction and overzealousness—of abdication which would allow those possessing the most economic power to dictate what may be heard, and of censorship which would not allow the ideas communicated to the public."[12] In finding that the bylaws of the Associated Press violated the antitrust laws (the Sherman Act), Supreme Court Justice Hugo Black wrote, "The widest possible dissemination of information from diverse sources is essential to the welfare of the public."[13]

In broadcasting, the most resounding statement of the First Amendment rights of the audience remains the 1969 U.S. Supreme Court decision upholding the constitutionality of the Fairness Doctrine. "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. It is the purpose of the First Amendment to preserve an independent marketplace of ideas in

which truth will utimately prevail. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here."[14]

In 1970, Yale Law School Professor Thomas I. Emerson recognized the possibility of fashioning a new regulatory scheme out of this affirmative conception of the First Amendment "to promote the system of freedom of expression through encouraging wider participation by those who wish to communicate and greater diversity for those who wish to hear."[15]

*New York Times v. Sullivan*,[16] though concerned with libel in print, has broader ramifications. In striking down a claim that every defamatory statement about a public official must be true, Justice Brennan relied on the public's need to hear diverse opinions. "A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions . . . leads to . . . self-censorship. . . . Would-be critics of official conduct may be deterred from voicing their criticism . . . because they doubt whether it can be proved in court."[17] "No recent constitutional development has had greater impact on basic First Amendment theory than Sullivan and its successor decisions."[18]

The Court's interpretation of the First Amendment led to a new theory of the marketplace, as freedom of expression serving as a "safety valve for minority groups."[19] Groups that had traditionally been shut out of the media for economic reasons found comfort in the language of the Times rule. In embracing "a newly minted central meaning of the First Amendment,"[20] the court recognized "a broad societal interest in the free flow of information."[21]

How far the government can go in stimulating debate by forcing open the media has been an evolving question. At least two cases brought on the basis of this affirmative interpretation of the First Amendment have held there to be no right of access to place an ad in a newspaper[22] or to reply to a political endorsement run in a newspaper.[23] Still, the caveat of U.S. Supreme Court Chief Justice Warren Burger applies. "A newspaper can be operated at the whim or caprice of its owners; a broadcasting station cannot."[24] That still is true, but the broadcaster's independence is increasing nonetheless.

*The Fairness Doctrine*

Any discussion of the strides broadcasting has made under the First Amendment must consider the Fairness Doctrine. At various times in the history of broadcast regulation, the Fairness Doctrine has been interpreted both loosely and narrowly. "The genius of the Fairness Doctrine has been precisely the leeway and discretion it affords the licensee."[25]

The Fairness Doctrine grew out of an early FCC policy banning editorializing.[26] Obviously, this hampered a licensee's ability to serve the public interest. Realizing its error, the commission in 1949 issued a new policy.[27] Licensees were to devote a reasonable amount of time to the coverage of controversial issues of public importance and to do so fairly by affording a reasonable opportunity for contrasting viewpoints to be aired. Legislative recognition of the doctrine did not come until ten years later when it was incorporated into the "equal time rule" that applies to political candidates. (Section 315 of the Communications Act of 1934, as amended, compels a licensee who permits a qualified candidate for public office to buy time on its station, to afford equal opportunities to his or her opponents).

Extending the Fairness Doctrine to personal attacks has been criticized because it forces the licensee to afford access to his station to specific people for specific time periods "notwithstanding the general rule that satisfying fairness obligations is usually left to the editorial discretion of the broadcasters."[28]

There are two specific personal attack rules. According to the first—often called the political editorial rule—a broadcaster who takes an explicit position for or against a political *candidate* in an editorial, must notify the candidate opposed, or the rival of the candidate supported, and offer an opportunity to respond. Secondly, "(W)hen during the presentation of views on a controversial issue of public importance, an attack is made on the honesty, or like personal qualities of an identified person or group, the person or group must be given notice, a transcript of the attack, and an opportunity to respond."[29]

The personal attack rule was invoked by Fred J. Cook after an attack was made on him by the Rev. Billy James Hargis. Hargis had allegedly called Cook a "professional mudslinger" and accused him

of lying and of defending Alger Hiss.[50] Cook requested free time to reply, but the station's owner, the Rev. John Norris, turned him down. Cook appealed to the FCC, which ordered Norris to grant Cook's request. Norris took his case to the Court of Appeals for the District of Columbia, which upheld the FCC's ruling. The case became the landmark *Red Lion* decision, named after the licensee's name, Red Lion Broadcasting Co., Inc.

Many broadcasters feared that the specific facts of *Red Lion*—a fundamentalist preacher attacking the honesty of an author and a station refusing to grant free reply time—would present the Fairness Doctrine and the personal attack rules in such a way as to legitimize them. Accordingly, the Radio-Television News Directors Association (RTNDA) sought to challenge the commission in a case divorced from the *Red Lion* facts and in a forum less sympathetic to the FCC than the District of Columbia Court of Appeals. It challenged the legality of the personal attack rules before the Court of Appeals for the Seventh Circuit located in Chicago. More than one year after *Red Lion*, the Seventh Circuit Court struck down the FCC's new personal attack and editorializing regulations as "unconstitutional abridgements of broadcasters' freedom of expression."[51]

The two cases were combined and heard by the U.S. Supreme Court, which, in a unanimous decision written by Justice Byron White, upheld the FCC's order for free reply time and the commission's editorializing and personal attack rules. This decision marked a shift, albeit a temporary one, from concentration on the broadcaster's right to be free from governmental interference in his editorial decisions to an eloquent elaboration of the affirmative interpretation of the First Amendment as it applies to the Fairness Doctrine. A few excerpts from Justice White's landmark decision will illustrate:

> When there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable right to broadcast comparable to the right of every individual to speak, write or publish.[52]
>
> But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. *It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.* . . . It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the government itself or a private licensee. It is the right of the

public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here[53] (emphasis added).

Professor George Gordon has summed up the immediate effects of White's opinion as affirming a "quite revolutionary interpretation of free speech: the notion that the First Amendment granted, in effect, a collective right on the part of the radio and television audience to reasonable access via broadcast channels to significant viewpoints . . . rather than the protection of the rights of the broadcasters to operate as they pleased."[54]

Complaints about personal attacks are frequently filed with the commission. One by New York Congressman Benjamin Rosenthal against WMCA (New York) and its air personality, Bob Grant, was dismissed by an appeals court, overruling an FCC decision that had held in Rosenthal's favor. The decision turned on whether or not the remark in question was made during the discussion of views on controversial issues of public importance, thus bringing it within the Fairness Doctrine.

Writing for the court, Judge J. Skelly Wright ruled that the FCC in this case had improperly substituted its own judgment for that of the local broadcaster in determining when the remark was made. The WMCA decision is one in a series of steps that is taking government out of broadcaster decision making. As Benno Schmidt, Jr., a Columbia University law professor, has written, "The *Strauss* [WMCA's owner] decision constitutes a square holding that the FCC must defer to reasonable broadcaster judgments in dealing with all components of the Fairness Doctrine."[55] (It is interesting to note that the commission recently removed an ambiguity from the personal attack rule by exempting political uses from its purview. The Fairness Doctrine and Section 315 of the Communications Act now are mutually exclusive.)[56]

### *Proving A Chilling Effect*

In the final analysis, the utility of the Fairness Doctrine hinges on whether it "chills" or fosters the broadcasting of controversial issues. In *Red Lion*, the court brushed off the "chilling effect" argument by saying, "If experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of the coverage, there will be time

enough to consider the constitutional implications."[37] But in *Tornillo*, the court acted as if the adverse side-effects of a right of reply had already been determined. "Faced with penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced. Government enforced right-of-access inescapably dampens the vigor and limits the variety of public debate."[38]

This may mean it is time to take the court up on its offer and reevaluate the constitutional implications of the "chilling effect" of the Fairness Doctrine. If a new challenge were brought to the court, in light of recent decisions emphasizing the autonomy of the broadcaster, *Red Lion*, which seems to conflict with many other court decisions and FCC rulings, might be overturned by a showing of "chilling effects."

Benno Schmidt, Jr. has said that assessing "chilling effect" is "very difficult, perhaps impossible. . . . The nub of the issue is whether the Court will insist on an empirical showing of the 'chilling effect' of access requirements when, in fact, they tend not to be demonstrable."[39]

Nevertheless, some evidence already has been accumulated. In 1960, when Congress suspended the equal time rule for presidential candidates, the three major networks gave 39 hours of free time to major candidates. In 1964, with the equal time rule back in effect, this free time plunged to less than 4.5 hours.[40] While the equal time rule applies only to political candidates, its effect is analogous to that of the personal attack and editorial rules previously mentioned in that they all infringe upon a broadcaster's discretion by imposing specific requirements on the licensee.

Former FCC General Counsel Henry Geller has asserted that the number of stations engaging in political editorializing has decreased since the access rules became effective in July, 1967, as further evidence of a "chilling effect." Geller cites the FCC's Political Broadcasting Survey covering 1964 to 1968 as revealing that the number of television stations airing political editorials was 17 in 1964, rose to 21 in 1966, then fell to 10 in 1968, while the number of AM radio stations airing political editorials fell from 140 in 1964

to 110 in 1966 to 80 in 1968. Thus, in the four years studied, there was a 41 per cent decrease in television stations carrying political editorials and a 42 per cent decrease in AM radio stations carrying them.[41]

One possible reason for this decline is the strict time limits imposed on a broadcaster to notify the candidate opposed in the editorial or the opposing candidate(s) of the one endorsed. Specifically, when the editorial is to be broadcast at any time other than within three days of election day, an offer of reply time, along with a transcript of the editorial, must be sent out within 24 hours after the editorial is broadcast. If an editorial is broadcast within 72 hours of election day, the licensee must do so far enough in advance of the broadcast to allow the candidate(s) to have a reasonable opportunity to prepare a timely response.[42] Fred Friendly has found some historical evidence of the "chilling effect" of the personal attack rules in researching the political background that led to the *Red Lion* case. Fred Cook, he says, had been hired by a public relations firm associated with the Democratic National Committee to write articles and broadcast copy attacking right-wing broadcasters. One of these provocations led to Hargis' personal attack on Cook. The committee, in monitoring right-wing radio stations, had picked up Hargis' broadcast. According to Friendly, the committee staff helped Cook prepare and send demands for free time to all the stations that carried Hargis' broadcast.

> The critical point in Friendly's disclosure is that seasoned politicians in the Democratic National Committee invested a significant amount of personnel and money in the belief that monitoring right-wing broadcasts and demanding a right of reply would inhibit political expression unfavorable to the Democratic party. It is hard to imagine more compelling evidence that the personal attack rules do, indeed, have the "chilling effect" that the Supreme Court in *Red Lion*, with none of this evidence known to it, called "speculative".[43]

### *Banzhaf: First Strand in a Tangled Web*

The Fairness Doctrine was most strictly applied to advertising even before *Red Lion*, although the FCC quickly retreated after realizing it had flung open a pandora's box. In December, 1966, a young attorney, John F. Banzhaf III, asked WCBS-TV in New York to provide reply time to commercials that gave the impression that cigarette smoking is socially desirable. Benzhaf charged that this

was a controversial issue of public importance and thus was covered by the Fairness Doctrine. By attempting to apply that doctrine to advertising, Banzhaf struck at the "breadbasket of modern American mass media."[44]

WCBS-TV rejected Banzhaf's request, saying the doctrine did not apply to ads, whereupon Banzhaf forwarded his request and WCBS-TV's rejection to the FCC. The commission ruled that "a station which presents such advertisements has the duty of informing its audience of the other side of this controversial issue . . . that, however enjoyable, such smoking may be a hazard to the smoker's health."[45] The Court of Appeals upheld the commission's rule as being in line with its obligation to regulate broadcasting in the public interest but did not direct that equal time be given, arguing that to do so would infringe on the licensee's discretion.[46]

Although the FCC emphasized that its ruling was intended to apply to cigarette advertising, it was not long before Friends of the Earth petitioned WNBC-TV in New York to carry ads showing that smaller cars saved gas. WNBC-TV refused to carry the ads, saying that *Banzhaf* applied only to cigarette advertising. The commission agreed. "We decline . . . to extend the cigarette advertising ruling to other products."[47] Friends of the Earth appealed, and the District of Columbia Court of Appeals overturned the commission's ruling. It could see no difference between polluting the lungs by cigarettes or automobiles.

In another case, the Court of Appeals found no Fairness Doctrine implications in recruitment advertisements for the Army. It affirmed an FCC ruling that "recruitment announcements in and of themselves did not raise . . . issues, but went rather to the government's acknowledged right to raise an army."[48] In still another case, the Court of Appeals upheld an FCC ruling that refused to apply the Fairness Doctrine to advertisements for Chevron F-310, a product that Standard Oil of California claimed would help reduce auto pollution. The commission held, "The Chevron F-310 announcements do not argue a position on a controversial issue of public importance, but rather advance a claim for product efficacy."[49]

The commission did, however, find that the Fairness Doctrine applied to advertising when it took a stand on a controversial issue.

The FCC rejected NBC's contention that ads supporting the Alaskan pipeline were simply institutional ads for Esso and found instead that they constituted "the discussion of one side of a controversial issue of public importance."[50]

A tangled web emerged. No one really knew what advertisements were applicable under the Fairness Doctrine. In 1974, in an attempt to clarify the many questions surrounding the Fairness Doctrine, especially as it applied to advertising, the FCC issued a new Fairness Report "to foster uninhibited robust, wide-open debate on public issues."[51] With regard to advertising, the commission said its policies "must serve the purposes of the Doctrine without undermining the base of the (broadcasting) system."[52] CBS had asserted that if the doctrine were extended to include cereals, gas, oil, drugs and detergents, the network would lose about $6.8 million.[53]

The commission's 1974 report imposed on the licensee the obligation of making a "reasonable, common-sense judgement as to whether the 'advertisement' presents a meaningful statement which obviously addresses a point of view on a controversial issue of public importance. . . . If the ad bears only a tenuous relationship to that debate, or one drawn by unnecessary inference, the Fairness Doctrine would clearly not be applicable."[54]

In other words, the Fairness Doctrine would ordinarily not apply to *product* commercials. But it would apply to ads like the Esso pipeline commercial, which linked oil price increases to the need for the Alaskan pipeline. In sum, the 1974 report reflects another move toward greater licensee discretion. But one of the commission's more recent rulings throws doubt on just how much *Banzhaf's* web has come untangled. In September, 1974, four California radio stations were asked by the Public Media Center and other public interest and environmental groups to air views contrary to the pro-nuclear advertisements being run on the stations. Although the total time devoted by the stations to the presentation of anti-nuclear views was reasonably proportionate to that devoted to pro-nuclear views, the frequency of presentations and the extent of presentation of views during peak audience listening periods showed a marked disparity in favor of the pro-nuclear side, according to the commission. It overruled licensee discretion in this case and found that the stations had violated the Fairness Doctrine.[55]

*Pensions: The FCC and Programming*

The best example of the confusion that has surrounded the Fairness Doctrine's applicability and enforcement as applied to content can be seen by tracing the rather complex history of the *Pensions* case[56] which, though it never reached the Supreme Court, offers insight into how some jurists and FCC commissioners view broadcasting's regulatory framework.

NBC had aired a documentary on the many problems of private pension plans. Prodded by a Los Angeles actuary, Accuracy in Media (AIM) filed a fairness complaint with the FCC. AIM, which describes itself as a media watchdog, saw *Pensions: The Broken Promise* as a one-sided look at a controversial issue. After the Broadcast Bureau of the FCC agreed with AIM, NBC appealed to the full commission, which agreed with its staff. So, for the first time in history, the FCC applied the Fairness Doctrine to a network documentary and ordered NBC to show how it would meet its fairness obligations. NBC appealed to the courts. The late Judge Harold Levanthal reversed the commission, saying that the FCC's function is limited to correcting *abuses* of discretion. "The editorial judgments of the licensee must not be disturbed if reasonable and in good faith. . . . It has wide discretion and latitude that must be respected."[57]

AIM petitioned the Court of Appeals to rehear the case before all of its judges, rather than a three-judge panel. This is called an *en banc* hearing which, according to the Rules of Appellate Procedure, "is not favored and ordinarily will not be ordered,"[58] but AIM's request was granted. Then, two weeks before oral arguments, the court vacated its request because of the FCC's claim that federal pension reform laws had made the case moot. It was remanded to Levanthal's three-man panel, which dismissed the entire controversy. In effect, when the FCC agreed the case was moot, it was retracting its original order to NBC.

On the surface, this would seem to be another victory for broadcasters. Former Chief Judge David Bazelon disagrees, arguing that this chain of events has only increased the ambiguity of the Fairness Doctrine. Another view is that if the FCC could not sustain an order for corrective programming after it expended much time and effort, it would not be likely to issue similar orders in the future.

One of numerous examples of the commission's deference to licensee judgment in Fairness Doctrine programming issues was its dismissal in October, 1979, of a complaint charging NBC with a failure to make available reasonable opportunity for the presentation of opposing views on the issue of truck safety. The commission upheld NBC's judgment that the existence of certain acknowledged truck safety programs is not controversial.[59]

### *Who Decides What Ads Are Aired?*

One of the major victories for broadcaster autonomy was scored in 1973 when the Supreme Court, in *CBS v. DNC*,[60] issued an opinion which seems to have replaced *Red Lion*[61] as the leading precedent in broadcast regulation.

*CBS* in many ways picks up where *Red Lion* leaves off. "The question here is not whether there is to be discussion of controversial issues of public importance on the broadcast media [affirmed in *Red Lion*], but rather who shall determine what issues are discussed by whom, and when."[62] Two groups, the Business Executives' Move for Vietnam Peace (BEM) and the Democratic National Committee (DNC), were refused air time on various networks and stations to espouse their views. BEM wanted to purchase on Washington's all-news radio station, WTOP, one-minute spots that would have urged immediate withdrawal of American troops from Vietnam. WTOP declined to sell the businessmen time, citing its long-established policy of refusing to sell spot announcement time to individuals or groups to set forth views on controversial issues.[63] BEM argued that WTOP's refusal "violated the Fairness Doctrine, infringed on the public's right to hear contrasting views . . . and violated the First Amendment."[64] WTOP claimed it had carried "the views of a variety of Administration critics on the war on numerous occasions."[65]

To the FCC, the question was whether WTOP had exercised "reasonable, good-faith judgment in applying the Fairness Doctrine."[66] It ruled that WTOP had acted reasonably and that BEM lacked the specific evidence required to file a Fairness Doctrine complaint. It also ruled that WTOP's policy of refusing spot announcements was not *per se* a violation of the Fairness Doctrine or any other portion of the Communications Act of 1934.

The DNC asked the commission for a declaratory ruling, arguing that "A broadcaster may not, as a general policy, refuse to sell time to responsible entities, such as DNC, for the solicitation of funds and for comment on public issues."[67]

The crux of CBS's argument, on the other hand, was "that there is no constitutional or statutory right to compel broadcasters to carry the DNC program and that such obligations would be contrary to the Communications Act and Commission precedent."[68]

DNC did not charge infringement of the Fairness Doctrine in its request. "What is involved . . . ," the FCC wrote, "is a question whether there is a right of access to broadcast facilities by 'responsibile entities' over and beyond the Fairness Doctrine right of the public to be informed."[69] The commission ruled that there is no such right. It emphasized reliance on a broadcaster's discretion to allocate discussion of controversial issues "on the basis of the *public* interest—not that of any private group, no matter how powerful or affluent."[70] However, the commission did declare that a blanket ban on the sale of advertising time for solicitation of funds for political parties was contrary to the public interest.

BEM and DNC appealed the FCC's rulings to the D.C. Court of Appeals, where Judge J. Skelly Wright, writing for the majority of a three-judge panel, reversed the commission's holding. The Court ruled that a flat ban on paid public issues advertisements violated the First Amendment, at least when other types of paid announcements were accepted. Wright based his argument on the affirmative interpretation of the First Amendment, rather than on the autonomy of the broadcaster, as the FCC had done. He wrote that the issue at stake "concerns the public's right to engage in and hear vigorous public debate on the broadcast media,"[71] especially during non-program times. "We are convinced," Wright wrote, "that broadcast advertising has great potential for enlivening and enriching public debate on public issues, rather than drugging it with an overdose of non-ideas and non-issues as is now the case."[72] Stressing the paramount importance of local licensee discretion, the court did not hold "that the planned announcements of the petitioners or, for that matter, any other particular applicant for air time, must necessarily be accepted by broadcast licensees."[73] The flat ban, though, was unacceptable to the court.

Wright, in effect, saw broadcasters as engaging in "state action."

Until then, this concept had been held not to apply to the media. Wright, however, argued that "the general characteristics of the broadcast industry reveal an extraordinary relationship between the broadcaster and the federal government—a relationship which puts the industry in a class with few others. It is one of independence and joint participation."[74]

According to Wright, perhaps the most important First Amendment interest is "the interest of individuals and groups in effective self-expression. . . . The limited nature of broadcast time does not dictate that the individual and group interest in self-expression be brushed aside entirely; it allows for a reasonably regulated, abridgeable right to speak."[75] This was especially important as it related to paid editorial advertisements because, according to the court, "Even if broadcasters were to succeed in presenting a full spectrum of viewpoints and partisan spokesmen on non-advertising time, their retention of *total* initiative and editorial control is inimical to the First Amendment."[76]

This intermediate decision was a victory for public interest groups, as well as for BEM and DNC, that had been clamoring for access to the media. But those who lost the decision—CBS, ABC, WTOP and the FCC— appealed to the Supreme Court, which needed five separate opinions to overturn Wright's decision. Chief Justice Burger, writing for a majority of the court, ruled that "Neither the Communications Act nor the First Amendment requires broadcasters to accept paid editorial advertisements."[77] Admitting that balancing First Amendment interests in broadcast regulation is a delicate and difficult task often requiring the FCC to walk a "tightrope," Burger concluded that "in the area of discussion of public issues, Congress chose to leave broad journalistic discretion with the licensee. Only when the interests of the public are found to outweigh the private journalistic interests of the broadcasters will government power be asserted."[78]

In general, the court held that the licensee "is allowed significant journalistic discretion."[79] In this particular case, Burger wrote that "the licensee policy challenged . . . is intimately related to the journalistic role of the licensee for which it has been given initial and primary responsibility by Congress."[80]

In one of the most far-reaching passages of Burger's opinion, and most predictive of how the court would view *Tornillo* a year later,

he declares, "For better or for worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspaper and broadcast—can and do abuse their power is beyond doubt, but that is no reason to deny the discretion Congress provided."[81] Regimenting of broadcasters "is too radical a therapy for the ailments [BEM and DNC] complain of."[82]

Justice William O. Douglas agreed with the result in *CBS* but maintained that broadcasting and print should share equal protection under the Constitution's guarantee of a free press. Justices William Brennan and Thurgood Marshall dissented, with Brennan writing, "I can only conclude that the exclusionary policy upheld today can serve only to inhibit, rather than to further, our profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open."[83] But the majority reverted to a theory of broadcast regulation based on the legislative history of the Communications Act, stressing the editorial autonomy of the local broadcaster. It was a victory for broadcasters, one that continues to move them toward parity with their counterparts in print.

While the *CBS* court did not undo the specific ruling of *Red Lion*, it did blunt the media reform movement which *Red Lion* had helped spark. That is to say, the "newfangled interpretation of freedom of the press,"[84] to which *Red Lion* had given Supreme Court approval, was discarded and replaced with a traditional one, balancing the First Amendment freedoms involved in favor of the broadcaster, rather than the audience.

*Debates, News Conferences and Section 315*

Section 315(a) of the Communications Act, commonly called the "equal time" rule, provides that if a broadcaster allows a legally qualified candidate for public office to use his facilities, he must afford equal opportunities to all opponents.[85] Certain exemptions were made in 1959 after Lar Daly, a perennial mayoral candidate in Chicago, sought equal time after the incumbent mayor appeared on a newscast greeting a foreign diplomat. The exemptions voided the provision for appearances by any candidate on a bona fide newscast, a bona fide interview, a bona fide documentary (if the appearance is incidental to the subjects covered by the documentary) or on-the-spot coverage of bona fide news events.

The Aspen Institute Program on Communications and Society and the Columbia Broadcasting System asked the FCC, in 1975, to overturn two of its previous rulings that held that debates[86] and press conferences[87] were not covered by these exemptions. CBS contended that live broadcasts of presidential news conferences constitute "on-the-spot coverage of bona fide news events." It argued that "*a reasonable decision by a broadcaster* that a Presidential press conference is sufficiently newsworthy to merit on-the-spot live coverage should be determinative of whether the broadcast is exempt."[88] (Stress added.) CBS also stressed that a distinction should be drawn "between those Presidential conferences called by a President-candidate in furtherance of his duty as Chief Executive to keep the people informed on important national and international issues, and purely political press conferences."[89]

The FCC, in a split decision, ruled to exempt debates in which a candidate had no part in controlling the format. It also ruled that "press conferences of the President and all other candidates for political office broadcast live and in their entirety, qualify for exemption."[90] It said its decision would further the public interest "by allowing broadcasters to make a fuller and more effective contribution to an informed electorate."[91] Seeming to show an increased faith in the judgment of the local broadcaster, the commission said, "We feel that the absence of abuse in the past 15 years of a broad newscast exemption fails to support the doomsayers' thesis that this narrower exemption will be abused."[92] The FCC's ruling subsequently was upheld in the courts.

The ruling places more discretion in the hands of the broadcaster. Broadcasters now are free to determine whether a candidate's appearance in a debate or news conference is sufficiently newsworthy in and of itself to warrant live coverage. The commission, by its ruling, seeks to increase substantive news coverage of political campaigns, an area criticized as receiving only superficial coverage. By releasing broadcasters from unnecessary restraints that had caused "the undue stifling of news events involving candidates for public office,"[93] *Aspen* reflects government's renewed faith in the discretion of broadcasters, at least when the question relates to journalism.

*'Indecency:' The Censor Lives*

First Amendment law is a fluid discipline. It is dependent upon the nation's mood and security, the composition of its courts and the subject matter being aired. What the Supreme Court gave broadcasters with one hand with *Aspen*, it took away with the other with *Pacifica*.[94]

Pacifica's New York FM radio station, WBAI, broadcast George Carlin's monologue "Filthy Words," in which Carlin pokes fun at those words barred from the airwaves. The monologue was broadcast at 2 p.m. during a program that was exploring society's attitude toward language.

The commission labeled the monologue "patently offensive," and followed up with an opinion pointing out that it never intended to place an absolute prohibition on the broadcast of this type of language, but rather sought to channel it to times of day when children least likely would be exposed to it.[95]

Writing for the 5-4 majority of the court, Justice John Paul Stevens upheld the commission's right to associate a matter of this nature with the station's license renewal application. That is, though no specific sanctions were levied against the station, the commission could consider the incident in assessing WBAI's performance when its renewal application is reviewed. In answer to the predicted cries of "censorship" and "chilling effect," Stevens wrote:

> It is true that the Commission's *Order* may lead some broadcasters to censor themselves. At most, however, the Commission's definition of indecency will deter the broadcasting of patently offensive [words for] sexual organs and activities. While some of these references may be protected, they surely are at the periphery of First Amendment concern.[96]

The decision notes that broadcasting is not entitled to the same First Amendment protection as print because 1) broadcasting has "established a uniquely pervasive presence in the lives of all Americans"[97] and 2) broadcasting is "uniquely accessible to children, even those too young to read."[98]

The threshhold question for the Supreme Court was whether the commission had the authority to regulate a radio broadcast characterized as "indecent but not obscene."[99] Stevens concluded, "When the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene."[100]

If "indecency" is left to be defined by a Supreme Court with "fragile sensibilities,"[101] its application as a reason for censorship may or may not end with the Carlin monologue. Moreover, at a time when a diversity of outlets abounds, the *Pacifica* Court's reliance on broadcasting's impact on and accessibility to children replaces the spectrum scarcity argument with a much more subjective yardstick. The reach of the yardstick may someday exceed its original three feet.

*The Family Viewing Hour Decisions*

The American system of broadcasting theoretically has always been based on the responsibility of the local broadcaster to the audience. Except for a few exceptions not pertinent here, the broadcaster is accountable for everything broadcast on the station. In its 1949 report on editorializing, the Commission reaffirmed its longstanding conviction that the licensee's responsibility for the selection of programming material "can be neither delegated by the licensee to any network or other person or group, or unduly fettered by contractual arrangements restricting the licensee in his free exercise of his independent judgments."[102]

That this concept remains the backbone of our system was never better demonstrated than in the *Family Hour* decision. Since the facts of the case have been a bone of contention among the parties, the background material presented here constitutes the "facts" as seen by Judge Warren J. Ferguson of the U.S. District Court in Los Angeles.

For many years, concerned citizens have complained about excessive sex and violence on television, especially during the early evening hours when many children are glued to the set. While no concrete proof has ever linked sex and violence on television directly to any adverse social, physical or psychological damage, the U.S. surgeon general has stated:

> The data on social phenomena such as television and violence and/or aggressive behavior will never be clear enough for all social scientists to agree on the formulation of a succinct statement of causality. But there comes a time when the data are sufficient to justify action. That time has come.[103]

In June, 1974, Congress ordered the FCC to report specific positive actions taken or planned to protect children from excessive pro-

gramming of violence and obscenity. Chairman Richard Wiley, according to Ferguson, "acting on behalf of the Commission—and with the approval of the commissioners—in response to [this] congressional . . . pressure launched a campaign primarily designed to alter the content of the entertainment programming in the early evening hours."[104]

The campaign took many forms, but began with an FCC suggestion to the National Association of Broadcasters (NAB) "to strengthen its position on televised violence."[105] The NAB Television Code Board rejected the idea. Since the NAB is not licensed by the FCC, the commission exerted a different type of pressure. Six days after the Code Board rejected the proposal, "Wiley took the first in a series of steps designed to bring Commission pressure to bear on the industry. In a speech delivered to the Illinois Broadcasters Association, he focused on the question of violence and obscenity on television—particularly as to the effects of such presentation on children." The speech "reminded" broadcasters of their public interest accountability and special responsibilities as licensees. It stated that if self-regulation does not work, governmental action to protect the public may be required."[106] This speech was followed by a number of meetings between Wiley and his staff and the Washington vice presidents of the three networks. Wiley proposed that each network issue a statement of policy on televised sex and violence, hoping "that the policies include cautionary warnings, and that programs requiring warnings be scheduled later in the evening."[107]

More meetings followed, some of which included the network presidents. At these meetings, Wiley made it clear he wanted *industry-wide* acceptance of a policy. Wiley's point: "Do something to curb offensive material or we, the FCC, will be forced to take action."[108]

Eventually, the NAB Code Board adopted an amendment to its code, after all three networks previously had agreed to it in closed-door sessions. The amendment stated that, "Entertainment programming inappropriate for viewing by a general family audience should not be broadcast during the first hour of network programming and the immediately preceding hour."[109] The result, according to Ferguson, was that "Instead of programming on the basis of their own independent judgment, broadcasters have been forced to

program with a view toward what should be considered objectionable by the Television Code Review Broad."[110]

Ferguson ruled that the networks' and NAB's conduct constituted "state action" because of the amount of FCC involvement with their decision to adopt the "Family Viewing" concept. "The Commission," he stated, "has participated in an unprecedented joint venture with the most powerful forces in broadcasting to permit a national board to dictate what may be heard, to implement a policy developed and conceived by the government."[111]

The crux of the decision, though, went far beyond the "Family Viewing" concept. Restating the importance of licensee discretion, Ferguson ruled that while broadcasters are free to adopt the concept individually, even if government officials have encouraged it, "they are not free . . . to program on any basis other than their own independent judgments of what constitutes good programming. . . . Independent decision making by local licensees acting in their capacity of public trustees . . . is not only the cornerstone of the Federal Communications Act, but also of the constitutional foundation of the broadcasting system."[112]

Relying on Burger's opinion in *CBS v. DNC*, Ferguson concluded that "if the decision to refuse editorial advertisements is within the range of editorial discretion afforded to broadcasters, then an individual decision to adopt a policy such as 'Family Viewing' must be similarly safeguarded."[113]

While the Code's purpose is to prevent the imposition of a stricter governmental code, even forced adherence to the code of the NAB is tantamount to censorship. In 1945, the Supreme Court stated, "Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests."[114] With this as precedent, Ferguson wrote, "In short, the NAB has no constitutional right to set up a network to censor and regulate American television."[115] It has the right to lobby for the interests of broadcasters, but not to undermine their independent decisionmaking.

Still, Ferguson did not shut the door on citizens concerned with televised sex and violence. "It may be, for example, that a record could be compiled that would demonstrate that particular types of programming are so demonstrably injurious to the public health that their entitlement to First Amendment protection in the broad-

casting medium could be properly questioned. It may be that the rights of children to diversity of programming have been so severely ignored that affirmative requirements that broadcasters meet their needs in the time when children most frequently watch television could be constitutionally supported *in a properly prepared administrative record*"[116] (emphasis added). But in this case, Ferguson found that the commission "compromised licensee independence in two ways: first, it pressured the networks to adopt the Family Viewing policy; second, it participated in a conspiracy to usurp licensee independence through the vehicle of the NAB. Those activities violated the First Amendment."[117]

The two themes underpinning Ferguson's decision are that individual licensees should be free to program as they see fit without judicial interference and that neither the FCC nor the NAB should be permitted to interfere with independent licensee decision making.

Relying on these principles, the district judge ruled that adoption of the "Family Viewing Hour" by each of the networks, the NAB and the FCC violated the First Amendment. The networks, though, are free to continue or discontinue the policy as long as their decisions are based on independent conceptions of the public interest. If the First Amendment has any meaning at all, Ferguson concluded, "it is that broadcasters, not FCC officials or judges, have the authority to make programming decisions."[118]

In December, 1979, Judge Ferguson's decision was overturned on jurisdictional grounds. The appellate court sent the proceeding back to the FCC for it to consider the legality of the policy and the manner in which it was adopted. The limited procedural ruling is narrow in scope and careful to point out that Ferguson's findings of fact and conclusions of law may well be correct. However, because the parties did not exhaust their administrative remedies, Circuit Judge Joseph T. Sneed remanded the case to the commission. The opinion focuses on the lower court's thrusting itself into the "delicately balanced system" of broadcast regulation.[119] According to Sneed, it is not until the commission has had the chance to decide and rule on its *own* alleged violations that "courts [should] step with even modest confidence into these sensitive and difficult areas."[120] The appellate court seeks to elicit the commission's own determination of whether its actions crossed the rather undefinable line between regulation by "raised eyebrow" and regulation by intimida-

tion. Once that determination has been made, the parties may proceed with their legal remedies.

Had the appellate opinion gone no further, it would have been palatable to broadcasters, but Judge Sneed's decision strikes at Ferguson's "bedrock principle" of keeping the government out of broadcasting. While Ferguson calls the commission "palpably without jurisdiction to interfere with broadcaster decision making in the manner complained,"[121] Sneed takes *CBS v. DNC* and uses it to promote just such interference. "It simply is not true that the First Amendment bars *all* limitations of the power of the individual licensee to determine what he will transmit to the listening and viewing public."[122] Within this permissible scope of governmental involvement in broadcasting may well be the "jawboning" complained of in this case.

The procedural course that will follow cannot be predicted. It is possible that the Supreme Court will take this opportunity to make its latest pronouncement in the area of broadcast regulation. At issue now is more than the constitutionality of the "Family Viewing Hour." Rather, the issue has become the degree of permissible governmental involvement in the regulation of broadcasting. As this study hopefully has demonstrated, the time certainly is ripe for such a comprehensive review by the highest court in the nation.

*Conclusions*

Broadcaster autonomy has come a long way in the past few years. While some will argue that this has infringed on the rights of the audience which the *Red Lion* court called "paramount," broadcasters remain licensed to operate in the public interest, as they interpret that standard to apply to their communities. As long as a broadcaster's judgment is made in good faith, the FCC probably will allow it to stand. An exception, of course, would remain for extraordinary circumstances such as Carlin's "Filthy Words" routine.

Perhaps a standard similar to that invoked in *New York Times Co. v. Sullivan*[123] should be used in deciding when Fairness Doctrine compliance lies outside of a broadcaster's discretion. For example, unless the controversial program is proven to have been aired by the station with an intent to mislead the public or with "actual malice" (as defined by the Times rule), the licensee would have its entire license period in which to present a balanced view of the issue. Spe-

cific remedies could be dictated by the commission only when the intent to mislead or "reckless disregard" was established.

*CBS v. DNC* gives the broadcaster wide latitude to decide how it can best fulfill its obligation to the community. Many will argue that if editing is left completely to editors, no one will be left to protect the rights of the audience. Still, the FCC retains its seldom-used power to revoke or refuse to renew a license in light of flagrant violations of the public trust.[124] Increasingly, station owners and citizen groups are negotiating settlements in lieu if litigation. Should this healthy trend continue, government will have even less reason to enter the business of broadcasting.

Although *Red Lion* remains law, its roar has certainly been muted. While the personal attack and editorializing rules remain constitutionally accepted, the new First Amendment rights of access for the audience, as envisioned by such reform leaders as Nicholas Johnson and Jerome Barron, have received few encouraging signs of support in recent years. The affirmative interpretation of the First Amendment has taken a back seat, for the time being at least, to the traditional "hands off the press" approach.

The language of *CBS* is a far cry from that of *Red Lion*, which, according to a communications law casebook, was "a flat declaration that the central First Amendment interest in free speech in broadcasting is the public's, not the broadcaster's."[125] To the Burger court, the paramount rights of the public are best served through an independent broadcaster aware of his obligation to operate in the public interest—and accountable to the public for its failure to do so.

The change in the court's outlook probably can be laid to a number of factors, the least of which is not the conservative Nixon appointments to the bench. The decline of a politically activist civil rights movement also may have dulled the need for citizens' rights in broadcasting, in the eyes of the justices. In addition, the popularity of cable television is increasing the number of alternative ideas disseminated, thus decreasing the clamor for access to over-the-air stations.

One inescapable conclusion from looking at the history of broadcast regulation, advocated by a number of writers cited here, seems to be that the time is ripe for a new look at the constitutional implications of any "chilling effect" of the Fairness Doctrine. Since the

negative effect of an enforced right of reply was a rationale for the Burger Court's decision in *Tornillo*, that decision seems incompatible with *Red Lion*, which had called the "chilling effect" merely speculative. The court left itself open to this reconsideration by stating that if the doctrine's "chilling effect" far outweighed its intended effect of greater access to conflicting ideas, "there would be time enough to reconsider the constitutional implications."[126] That time might well be now.

The narrow holding of Judge Sneed—overturning the Family Viewing Hour decision on procedural rather than substantive grounds—should have no real effect on programming. But should future courts pick up on Sneed's dicta, the results could set back broadcasters' gains in their fight for independence from government. Just as the *Pacifica* ruling, if narrowly construed, will not hamper programming, Judge Sneed's ruling, if confined to its procedural holding, will not lessen broadcaster automomy. However, should the *Pacifica* principle extend to risque rather indecent programming or should *Writers Guild* reach beyond its procedural parameters, the tide toward broadcaster parity with print could be swiftly halted.

## *NOTES*

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16. 376 U.S. 254 (1964).

17. *Id.*, at 279.

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20. Schmidt, p. 85.

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24. *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1003 (1966).

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26. *In the Matter of Mayflower Broadcasting Corp., and Yankee Network, Inc.*, 8 FCC 333 (1940).

27. *Report On Editorializing By Broadcast Licensees*, 13 FCC 1246 (1949).

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30. Fred Friendly, *The Good Guys, The Bad Guys and the First Amendment* (New York: Random House, 1976), p. 5.

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67. *In re: Democratic National Committee Request for Declaratory Ruling Concerning Access to Time on Broadcast Stations*, 25 FCC2d 216 (1970).

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120. *Id.*, at 362.
121. *Writers Guild of America, West v. FCC*, 423 F.Supp. 1064, 1083 (1976).
122. *Writers Guild of America, West v. American Broadcasting Co.*, 609 F.2d 355, 364 (9th Cir. 1979).
123. 376 U.S. 254 (1964).
124. *See*, e.g., *Trustees of University of Pennsylvania*, 69 FCC2d 1466 (1978).
125. Harold L. Nelson and Dwight L. Teeter, Jr., *Law of Mass Communications* (Mineola, N.Y.: Foundation Press, 1973), p. 503.
126. 395 U.S. 367, 393 (1969).